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Case No. 88-8018

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

IN RE:
JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
DEBTORS,

JACK R. WHITEHORN AND
MARY RUTH WHITEHORN,
PETITIONERS,

V.

MARGARET H. MURPHY AND LAW FIRM:
SMITH, GAMBRELL & RUSSELL,
DEFENDANTS (APPELLEES).

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES
PURSUANT TO TITLE 28 U.S.C. § 1254**

APPENDIX

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TABLE OF CONTENTS

PAGE

Appendix 1

Complaint Filed by Petitioner/ Debtors-in-Possession. 3

Answer by Appellees. 14

Appendix 2

Grant of Appellants' Motion for Stay of Mandate, Entered August 16, 1988. 31

Appendix 3

Petition to the United States Court of Appeals for the Eleventh Circuit for Rehearing in Banc Denied, Order Entered July 22, 1988. 35

Appendix 4

United States Court of Appeals for the Eleventh Circuit Order Affirming the District Court Order Issued May 26, 1988. 39

Appendix 5

United States District Court Order Affirming the United States Bankruptcy Court for Northern District of Georgia, Newnan Division Order Entered December 23, 1987. 43

Appendix 6

United States Bankruptcy Court for Northern District of Georgia, Newnan Division Judgment 59
Order for Defendants Entered July 31, 1987. 60

Appendix 7

Transcript of Motion for Change of Venue Adversary Proceeding No. 860045 from Commencement Court, United States Bankruptcy Court, District of Nevada to United States Bankruptcy Court, Northern District of Georgia, Newnan Division. 83

Appendix 8

Transcript 89

Order of Judge Jones' Ruling on Show Cause Hearing

Pertaining to Wording in Order to Transfer the Venue of Adversary Proceeding No. 860045 Entered December 17, 1986. 97

Certificate That No Proceeding to Lift Stay Has Been Filed, Entered December 2, 1986 99

Appendix 9

Order Setting Out That All Provisions of Title 11 United States Bankruptcy Code Is Restored Nunc Pro Tunc October 6, 1980 to Petitioners/Debtors, Entered May 31, 1988 107

Appendix 10

United States Court of Appeals for the Eleventh Circuit Order Denying Motion of Appellants for Enlargement of Time for Stay of Mandate, Entered October 4, 1988. 111

Appendix 1

Complaint Filed by Petitioner/

Debtors-in-Possession and

Answer by Appellees

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

COMPLAINT TO COMPEL TURNOVER OF PROPERTY

Entered April 3, 1986

COME NOW Jack R. Whitehorn and Mary Ruth Whitehorn, Debtors-in-Possession in the above captioned case and respectfully show the Court as follows:

1. Plaintiffs are duly qualified and Debtors-in-Possession in this case.

2. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1471 and 11 U.S.C. §542.

3. This adversary proceeding is brought by the Plaintiffs, Jack R. Whitehorn and Mary Ruth Whitehorn, as Debtors-in-Possession, and asserts that the Debtors-in-Possession are entitled to have property, namely one hundred percent (100%) of WFDR, Inc. stock turned over or sold to Defendants named in the caption

of this proceeding. The said stock was issued and titled to Jack Whitehorn, Certificate No. 1 for 50 shares and Certificate No. 2 for 5000 shares on December 1, 1969 and has never been transferred by Jack Whitehorn or by order of this Court.

(A)

The said stock was pledged, in addition to corporate assets to the Citizens State Bank, Butler, Georgia, as additional collateral for corporate loans, renewals and/or extensions.

(B)

On July 23, 1979, a refinancing plan was completed by WFDR, Inc. with Plaintiff as one hundred percent stockholder, President and sole Director with the Citizens State Bank, Butler, Georgia. The said stock was pledged and left with said bank as additional collateral; no power of attorney for

transferring said stock was included in the transaction.

(C)

On March 28, 1980, Plaintiff, Jack Whitehorn, executed a stock option with blood brother, John F. Whitehorn.

(D)

On May 8, 1980, Plaintiff, Jack Whitehorn, disavowed said Stock Option and asserted full and complete authority over the corporation and its holdings as President, sole Director and 100% stockholder.

(E)

On May 9, 1980, without Plaintiff, Jack Whitehorn's knowledge or approval or any corporate resolution, and with Defendants' sole direction, WFDR, Inc. was placed in a Chapter 11 proceeding in the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division, Bankruptcy No. 80-00136N.

(F)

The above captioned Defendants allegedly acted as attorneys for the Debtor-in-Possession corporation as well as Estate Administrator.

(G)

On July 24, 1980, an adversary proceeding was filed on behalf of Plaintiffs in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, being Adversary Case No. 80-0034N. The Court subsequently abstained from hearing said proceeding.

(H)

On October 6, 1980, the Plaintiffs filed a Chapter 11 proceeding in the United States Bankruptcy Court, District of Nevada, effecting the automatic stay under 11 U.S.C. §362, Case No. BK-LV-80-936. The said stock was, on October 6, 1980, property of Plaintiff.

Citizens State Bank, holder of said stock was so noticed of automatic stay, along with WFDR, Inc. and Defendant law firm. No Plan of Reorganization by WFDR, Inc. had been offered and/or filed with the United States Bankruptcy Court, Northern District of Georgia, Newnan Division on October 6, 1980.

(I)

On December 8, 1980, a preference action against John F. Whitehorn was filed by Plaintiffs in this Honorable Court for the purpose of recovering the one hundred percent (100%) WFDR, Inc. stock.

(J)

Upon motion to change the venue of the case by John F. Whitehorn to this Court, the Honorable Judge Lloyd D. George, presiding, transferred only the adversary proceeding No. 800197 filed in Case BK-LV-80-936 to the United States

Bankruptcy Court, Northern District of Georgia, Newnan Division and retained jurisdiction of Plaintiffs' Chapter 11 proceeding, Case No. BK-LV-80-936.

(K)

During the period of time the Plaintiffs' transferred adversary proceeding was being prepared by Counsel and/or heard by Judge W. Homer Drake, United States Bankruptcy Court, Northern District of Georgia, Newnan Division, Adversary Proceeding No. 81-0039N, the Defendants, acting under color of the law, influenced the Citizens State Bank to turn over or sell Plaintiff's stock to Defendants while having full knowledge of Plaintiffs' Chapter 11 proceedings in this Honorable Court and the effective automatic stay. No hearing was held before this Court for lifting of the automatic stay protecting Plaintiffs' property, i.e. the said one hundred

percent of WFDR, Inc. stock.

(L)

On or about August 18, 1981, Defendants took possession of Plaintiff's property, one hundred percent (100%) of WFDR, Inc. stock issued and titled to Jack Whitehorn. It has been disclosed that Defendants, after taking or buying said stock from said bank, sold, cancelled or traded Plaintiff's stock without Plaintiff's or this Court's authorization, a direct contempt of this Honorable Court.

(M)

The adversary case transferred from this Honorable Court to United States Bankruptcy Court, Northern District of Georgia, Newnan Division, Case No. 81-0039N, was tried December 16, 1981 and January 27, 1982, after the said stock had been turned over or sold to Defendants by said bank. An Order

entered on August 18, 1982, found the Stock Option Agreement a voidable preference. Said Order was appealed by John F. Whitehorn. The United States District Court vacated said order remanding back to the Bankruptcy Court for compliance with Bankruptcy Rule 752 and issues raised in Appellees §547. Judge Drake did not respond. A final Order was signed on the 25th day of January, 1984 by Judge W. Homer Drake, entered on January 26, 1984. Plaintiff objected but did not appeal the Order. No appeal was noticed by any other party.

The said Order by Judge Drake states: "The preference action successfully brought by Jack Whitehorn against Dr. John Whitehorn regarding the pre-petition transfer of stock has been remanded to this Court for additional findings of fact. However, that preference action has become moot under

the terms of the settlement by which Dr. John Whitehorn disavows any interest in the equity of the Debtor."

(N)

A written request was made to Defendants, November 2, 1984, for books and records of WFDR, Inc., including without limitation to stock certificates. Said communication requested a written response.

(O)

On November 12, 1984, written response was received from Defendants, denying Plaintiff's property that has been awarded pursuant to Court Order.

4. The stock is property which Plaintiff may use, sell or lease under 11 U.S.C. §363.

5. Plaintiff has requested delivery of said stock to him and the Defendants have failed and refused, and continue to fail and refuse to deliver

the same to him.

WHEREFORE Plaintiff prays that Defendants be ordered to surrender possession forthwith of said stock certificates, all assets said stock owns, including but not limited to Accounts Receivables, corporate books, records, bank records, cash, records of all transactions subsequent to May 8, 1980 to him and that he have such other and further relief as is just.

Dated April 3rd, 1986.

Respectfully submitted,

Jack R. Whitehorn

Debtor-in-Possession

Mary Ruth Whitehorn

Debtor-in-Possession

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

ORDER

ENTERED JULY 1, 1986

On Motion of the Plaintiffs for Leave to Amend Pleadings as Specified on the Original Complaint,

IT IS CONSIDERED, ORDERED AND DECREED that said Motion be, and the same is hereby allowed and that said Complaint be, and the same is hereby amended as follows:

Paragraph 1

"Plaintiffs are duly qualified as Debtors-in-Possession in this case, that the above named Debtors on October 6, 1980 filed a voluntary petition for relief under Chapter 11 Title 11, United States Code and on October 6, 1980, an Order was duly made and entered granting relief under said Chapter 11."

Paragraph 2

"This is an adversary proceeding brought pursuant to Bankruptcy Rule 7001(1) to recover property belonging to the above entitled estate, of which this Court has jurisdiction under the provisions of Title 28 U.S.C. §157(b)."

Dated this 25th day of June 1986.

UNITED STATES BANKRUPTCY COURT

Robert Clive Jones

Chief Bankruptcy Judge

* * * *

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

ANSWER TO COMPLAINT TO COMPEL TURNOVER OF PROPERTY

Entered on or about May 5, 1986

COMES NOW, Margaret H. Murphy and the law firm of Smith, Gambrell & Russell, named as defendants herein, and answer plaintiffs' Complaint to Compel

Turnover of Property as follows:

FIRST DEFENSE

Plaintiffs' complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

This Court lacks subject matter jurisdiction.

THIRD DEFENSE

This Court lacks personal jursidiction over Margaret H. Murphy and the law firm of Smith, Gambrell & Russell.

FOURTH DEFENSE

Plaintiffs' complaint fails to state a claim upon which relief may be granted in that all actions taken by attorney Margaret H. Murphy and the law firm of Smith, Gambrell & Russell with respect to the WFDR, Inc. stock at issue were pursuant to court orders issued by the United States Bankruptcy Court for the Northern District of Georgia, Newnan

Division.

FIFTH DEFENSE

Plaintiffs' claims are barred by their failure to join necessary parties in accordance with Fed. R. Civ. P. 19.

SIXTH DEFENSE

Plaintiffs' claims are barred by the doctrines of res judicata.

SEVENTH DEFENSE

Plaintiffs' claims are barred by the doctrine of collateral estoppel.

EIGHTH DEFENSE

Plaintiffs' claims are barred by the doctrine of laches.

NINTH DEFENSE

Plaintiffs' claims are barred in that there has been a satisfaction and accord. Plaintiff, Jack Whitehorn was paid $35,000 for the stock at issue pursuant to court approved settlement of claims.

TENTH DEFENSE

Plaintiffs have waived any right to recover by their failure to appeal the Order entered by the Bankruptcy Court for the Northern District of Georgia, Newnan Division, dated January 25, 1984 wherein the court ruled that claims, identical to those asserted in this complaint, were moot.

ELEVENTH DEFENSE

Plaintiffs are estopped from bringing this action in that all issues related and claims asserted in their complaint were raised, argued, and briefed and adjudicated by the Honorable W. Homer Drake, Jr., U.S. Bankruptcy Judge for the Northern District of Georgia, Newnan Division, in the Chapter 11 proceeding of WFDR, Inc., Case No.80-00136-N or in other adversary proceedings before that court.

TWELFTH DEFENSE

Plaintiffs' claims are barred by the provisions of 11 U.S.C. §1141 by the confirmation of the Plan of Reorganization of WFDR, Inc., Case No. 80-00136-N, which Plan was confirmed by the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division.

THIRTEENTH DEFENSE

Responding to the specific numbered paragraphs of plaintiffs' complaint, defendants answer as follows:

1.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph number 1.

2.

Denied.

3.

Denied. By way of further response, defendants state they do not have the

stock and that said stock was sold pursuant to a Chapter 11 Plan of Reorganization to Provident Broadcasting Corporation pursuant to orders of the U.S. Bankruptcy Court for the Northern District of Georgia, Newnan Division, dated March 16, 1981, April 9. 1981 and June 29, 1981.

A.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph A in that they are unaware of the specific transaction for which the stock was pledged. Defendants admit that the stock at issue was pledged to Citizens State Bank, Butler, Georgia. Except as expressly admitted, paragraph A is denied.

B.

Defendants lack knowledge or information sufficient to form a belief

as to the allegations of paragraph B.

C.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph C. By way of further response, Defendants state that plaintiff's brother, Dr. John Whitehorn, had a proxy to vote all of the shares of WFDR, Inc. and, by an appropriate corporate resolution, WFDR, Inc. filed a Chapter 11 Bankruptcy Petition.

D.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph D.

E.

Denied. By way of further response to paragraph E, defendants state that Margaret H. Murphy and the law firm of Smith, Gambrell & Russell acted as attorneys for WFDR, Inc. and that WFDR,

Inc. filed a Chapter 11 proceeding pursuant to an appropriate corporate resolution authorizing same.

F.

Defendants admit that they acted as attorneys for the debtor-in-possession corporation and as Estate Administrators pursuant to orders issued by the Bankruptcy Court for the Northern District of Georgia, Newnan Division, dated May 15, 1980 and May 29, 1980. Except as expressly admitted, paragraph F is denied.

G.

Admitted.

H.

Defendants lack knowledge or information sufficient to form a belief as to the plaintiffs' filing of a Chapter 11 proceeding in the United States Bankruptcy Court, District of Nevada and as to the ownership of the stock on

October 6, 1980. Defendants admit that, as of October 6, 1980, no Plan of Reorganization by WFDR, Inc. had been filed with the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. Except as expressly admitted, paragraph H is denied.

I.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph I. By way of further response to paragraph I, defendants state that the records of this Court speak for themselves.

J.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph J except that defendants admit that plaintiffs' adversary proceeding No. 80-0197 against Dr. John Whitehorn was transferred to the U.S. Bankruptcy Court,

Northern District of Georgia, Newnan Division. By way of further response to paragraph J. defendants state that the records of this Court speak for themselves.

K.

Denied. By way of further response to paragraph K, defendants state that all actions taken by them with respect to the stock at issue were pursuant to orders entered by the U.S. Bankruptcy Court for the Northern District of Georgia, Newnan Division.

L.

Denied. By way of further response to paragraph L, defendants state that, in a simultaneous closing transaction for the sale of WFDR, Inc. stock pursuant to its confirmed Plan of Reorganization, a portion of the proceeds from the sale of the stock were paid over to satisfy the indebtedness of the primary secured

lender for WFDR, Inc., Citizens State Bank, Butler, Georgia. Said lender then released the stock certificates which, pursuant to the Plan of Reorganization, were cancelled and reissued to Provident Broadcasting Corporation, the purchaser of said shares.

M.

Defendants lack knowledge or information sufficient to form a belief as to the allegations of paragraph M with respect to the dates of trial. The orders and court records of the United States District Court for the Northern District of Georgia speak for themselves; however, defendants admit that plaintiffs did not appeal the final order of the Honorable Judge W. Homer Drake, Jr. entered on January 26, 1984 and that said order became a final order. Except as expressly admitted, paragraph M is denied.

N.

Defendants admit receipt of a letter dated November 2, 1984; admit that a request was made for the books and records of WFDR, Inc. and admit a written response was requested. By way of further response to paragraph N, defendants state that the "cancelled stock certificate" was requested. Except as expressly admitted, paragraph N is denied.

O.

Defendants admit that they responded to plaintiffs' letter dated November 2, 1984. By way of further response, defendants state that the letter speaks for itself as to its terms, conditions and effects. By way of further response, defendants state that Jack Whitehorn was advised that the books and records were transferred to the stock purchaser, Provident Broadcasting Corporation.

Except as expressly admitted, paragraph O is denied.

4.

Denied.

5.

Defendants admit that Jack R. Whitehorn has requested delivery of the stock to him and admit that the stock has not been delivered to him. By way of further response, defendants state that the stock was disposed of pursuant to the court-approved Plan of Reorganization of WFDR, Inc. and that, as part of that Plan, his interest, represented by two "Certificates of Interest" which were distributed to him following the closing of the stock sale, were satisfied pursuant to the order of the Court entered on January 26, 1984. The Bankruptcy Court for the Northern District of Georgia, Newnan Division, approved a settlement that granted

plaintiff Jack R. Whitehorn the sum of $35,000, which payment satisfied in full any claim he might have had as a shareholder in the WFDR, Inc. bankruptcy proceeding. Except as expressly admitted, paragraph 5 is denied.

WHEREFORE, having fully responded to plaintiffs' complaint, defendants pray that this action be dismissed with prejudice, and that all costs be cast upon the plaintiffs.

Dated this 5 day of May, 1986.

LIONEL SAWYER & COLLINS

By Linda Riegle

Attorneys for Defendants

SMITH, GAMBRELL & RUSSELL

By Linda Riegle

for Joyce B. Klemmer

Appendix 2

Grant of Appellants'

Motion for Stay of Mandate

Entered August 16, 1988

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Case No. 88-8018

GRANT OF APPELANTS' MOTION

FOR STAY OF MANDATE

ENTERED AUGUST 16, 1988

The motion of appellants for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including Sept. 20, 1988, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above

mentioned certificate shall be filed with the Clerk of this Court within that time.

Phyllis Kravitch

United States Circuit Judge

* * * *

A Motion for Enlargement of Time for Stay of Mandate, Entered Sept. 16, 1988; Appellees' Objection to Said Motion Filed on or about Sept. 19, 1988; Petitioners/ Appellants Motion to Strike Appellees' Pleadings, Filed on or about Sept. 22, 1988. See Order entered at Appendix 10.

PUBLISHER'S NOTE :

The following pages are unavailable for filming: 33 thru 46

stock was cancelled and newly issued stock sold to Provident Broadcasting Company (Provident), the successor to Lake George Corporation.

One month after this sale, on September 18, 1981, this court dismissed as moot Whitehorns' appeals of the March 16, and April 8, 1981, orders approving the sale of assets since the sale of stock in lieu of the sale of assets had been approved and consummated. This court noted that the order approving the sale of the stock had not been appealed and that no stay of the sale was sought or obtained. The Eleventh Circuit affirmed this court's dismissal of the appeals as moot.

In the adversary proceeding between Whitehorns and Dr. John Whitehorn, the bankruptcy court entered an order in this matter on August 18, 1982, finding that the transfer to Dr. John Whitehorn was a

voidable preference. This court vacated that order and remanded for further findings. The bankruptcy court treated these proceedings as moot after it approved settlement agreement described below.

On July 14, 1983, the defendants, as Estate Administrators, and the Creditors' Committee of WFDR filed a joint application to settle claims which provided, among other things, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish his claim to ownership of the shares in WFDR, which would then be deemed to be held free and clear by Jack Whitehorn. The application of settlement further proposed that, pursuant to Jack Whitehorn's ownership interest, payment of $35,000 would be made from the remaining funds held by the WFDR Estate

Administrator to Jack Whitehorn's attorneys.

On January 26, 1984, the bankruptcy court entered two orders approving the proposed settlement including the payment to Jack Whitehorn's attorneys. The payment to Jack Whitehorn's attorneys from the WFDR proceeding was specifically authorized by an order from the District of Nevada where Whitehorn's personal bankrutpcy proceeding is pending. The $35,000 payment was made to Jack Whitehorn's attorneys after the filing of an application to pay administrative expenses. On November 15, 1984, a final decree was entered closing the estate of WFDR.

Whitehorns initiated the present proceeding by filing a "Complaint to Compel Turnover" on April 3, 1986 in the United States Bankruptcy Court for the District of Nevada, where plaintiffs'

Chapter 11 case is pending. In their complaint, Whitehorns seek to require defendants to "surrender possession" of the stock to WFDR and "all assets said stock owns, including but not limited to Accounts Receivables, corporate books, records...[etc.]." Whitehorns initiated this proceeding pro se and continue to proceed pro se.

On cross motions for summary judgment, the bankruptcy court granted the defendants' motion and denied the plaintiffs' motion. The bankruptcy court identified two alternate grounds for the grant of defendants' motion. First, the court found that Whitehorns' claim is barred by the doctrine of res judicata. Second, the court below granted defendants' motion to amend their answer by adding the statute of limitations as an affirmative defense and then held that Whitehorns' claim is time barred "to any

extent that it...seeks to avoid a post-petition transfer, because the action was not commenced within two years of the transaction sought to be avoided."

Res Judicata

Whitehorns, proceeding pro se in this appeal, describe twelve "Points Upon Which The Appeal is Predicated." (Appellants' Brief at 5-9). Within these twelve points, it appears that appellants' only argument concerning the bankruptcy court's finding that their claim for turnover is barred by the doctrine of res judicata is that the bankruptcy court did not have jurisdiction to issue the prior orders permitting the cancellation and sale of the stock of WFDR. Appellants assert that the bankruptcy court did not have jurisdiction because the stock was appellants' property and could not be disposed of or otherwise impaired without

lifting the automatic stay in effect in appellants' personal bankruptcy case pending in Nevada.

The primary issue on this appeal is whether the court had jurisdiction to issue the order approving the sale of assets to WFDR and the order approving the amended reorganization plan pursuant to which the stock of WFDR was cancelled. Appellants argue that the bankruptcy court's order affirming the settlement of claims resolving the dispute between John and Jack Whitehorn over the ownership of the WFDR stock clearly determined that the stock was the property of Jack Whitehorn. Since the stock was the property of Jack Whitehorn, plaintiffs contend that it could not have been cancelled and new stock sold to Provident without lifting the stay in the Whitehorns' personal bankruptcy case.

As the bankruptcy court noted, the

Whitehorns' ownership in the stock gave them only a certain bundle of rights and these rights were not affected by the cancellation of the stock and the issuance of the certificates of interest in the proceeds of the sale to Provident. Whitehorns' personal bankruptcy proceeding could not stay the ministerial act of cancellation of shares by the corporated debtor-in-possession any more than any individual shareholder's bankruptcy could stay the fluctuation of the market price of such individual's shares. Thus the bankruptcy court did not err in concluding that it had jurisdiction to enter the orders approving the sale of new stock which was sold to Provident with the former shareholders receiving certificates of interest in the proceeds of the sale.

The appellants have not contested the bankruptcy court's findings with regard to the other elements required for

res judicata. See Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979) ("For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.") The bankruptcy court did not err in finding that Whitehorns' claim is barred by the doctrine of res judicata. See Southmark Properties v. Charles House Corporation, 742 F.2d 862 (5th Cir. 1984) (upheld the application of the doctrine of res judicata to a case with facts similar to those in the case at bar).

It is not necessary for the court to address the statute of limitations issue - the alternate ground on which the

bankruptcy court granted defendants' motion for summary judgment.

For the reasons stated herein, the court affirms the order of the bankruptcy court granting appellees' motion for summary judgment and denying appellants' motion for summary judgment.

SO ORDERED, this 21 day of December, 1987.

G. Ernest Tidwell

Judge, United States District Court

Appendix 6

United States Bankruptcy Court

for Northern District of Georgia

Newnan Division

Judgment and Order

Entered December 23, 1987

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

Case Number BK-LV-80-00936

Adversary Number 87-002N

JUDGMENT

Judgment is hereby entered for the defendants in the above-styled adversary proceeding in accordance with the Order of the Court entered the 31 day of July, 1987.

At Newnan, Georgia, this 31 day of July, 1987.

W. H. Drake, Jr.

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

Case Number BK-LV-80-00936

Adversary Number 87-002N

ORDER

This adversary proceeding is before the Court on cross-motions for summary judgment. Plaintiffs, Jack R. Whitehorn and Mary Ruth Whitehorn ("Whitehorn"), initiated this proceeding by filing a "Complaint to Compel Turnover" on April 3, 1986, in the United States Bankruptcy Court for the District of Nevada, where the plaintiffs' Chapter 11 case is pending. On December 17, 1986, that Court entered an Order which granted the defendants' motion to transfer the adversary proceeding, but not the Chapter 11 case, to this district.

The complaint filed by Whitehorn seeks the turnover under 11 U.S.C. §542

of one hundred percent (100%) of the stock of WFDR, Inc., which is in the form of Certificate No. 1 for 50 shares and Certificate No. 2 for 5,000 shares, as well as "all assets said stock owns." WFDR, Inc. ("WFDR") was the owner of WFDR-AM and WFDR-FM radio stations in Manchester, Georgia, and a debtor in this district as a result of the filing of a petition under Chapter 11 on May 9, 1980 (Case No. 80-00136N). Defendant, Margaret H. Murphy, and the law firm of Smith, Cohen, Ringel, Kohler & Martin acted as attorneys for the corporate debtor-in-possession, WFDR, and as Estate Administrators in WFDR's Chapter 11 case. Smith, Cohen, Ringel, Kohler & Martin is the predecessor law firm to defendant, Smith, Gambrell & Russell.

The defendants seek summary jugment on the grounds that the plaintiffs' claims are barred by the doctrine of res

judicata as a result of orders entered in the Chapter 11 case of WFDR. Plaintiffs' motion for summary jugment asserts that this Court had no authority to dispose of the stock belonging to plaintiff Jack R. Whitehorn unless the stay was lifted in plaintiffs' individual Chapter 11 proceeding, which has been pending in the United States Bankruptcy Court for the District of Nevada since October 6, 1980. The material facts of this case as to which there is no genuine dispute are as follows.

Jack Whitehorn was the original sole shareholder of WFDR. On March 28, 1980, Jack Whitehorn executed a Stock Option Agreement which contained a proxy giving voting authority over the stock together with an option to acquire all of the outstanding stock to his brother, Dr. John Whitehorn. On May 9, 1980, WFDR, under management elcted through an

exercise of the proxy filed its Chapter 11 petition which commenced its bankruptcy case in this Court. Jack Whitehorn and Mary Ruth Whitehorn filed their own individual Chapter 11 case in Nevada on October 6, 1980.

On November 5, 1980, in Nevada and on July 22, 1980, in this district, Whitehorn initiated adversary proceedings against Dr. John Whitehorn, which proceedings contested ownership of the stock and control of the corporation.

On January 30, 1981, the Nevada court transferred the Nevada adversary proceeding to this district.

Also on January 30, 1981, WFDR, as debtor-in-possession, filed an application to sell its assets. Whitehorn objected to the application both as creditor of WFDR and as a claimant that he was the sole and rightful owner of all of the shares of WFDR. Following a

hearing, this court entered an Order, on March 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company ("Provident"). On April 8, 1981, this Court denied Whitehorn's motion for a new trial, for alteration or amendment of judgment, or for additional findings of fact. Whitehorn timely noticed an appeal from the Orders of March 16 and April 8, 1981 (hereinafter "Orders approving the sale of assets") but did not seek a stay of the sale.

Before the appeal was heard by the United States District Court for the Northern District of Georgia, WFDR filed, on May 27, 1981, an "Amended Plan of Reorganization" which proposed in Articles IV and V to implement the Orders approving the sale of assets by structuring the transaction in such a way

that the outstanding stock of WFDR would be cancelled, with prior holders of such stock receiving certificates of interest in the proceeds of the sale of newly issued stock to Provident.

Whitehorn filed objections to the disclosure statement and to confirmation of the amended plan on grounds, inter alia, that the management of WFDR which had authorized the filing of the Chapter 11 petition had no power to do so. On June 29, 1981, this Court entered an Order confirming the amended plan. In the confirmation order, the Court acknowledged that there was a pending adversary proceeding between Jack and John Whitehorn regarding the equity ownership of WFDR but stated that even if "Jack Whitehorn is proven to be the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization, the plan should be

confirmed pursuant to 11 U.S.C. §1129(b)(2)(C)." There was no appeal filed from the Order confirming the amended plan.

Following approval of the Federal Communications Commission of the transfer of control of WFDR and the filing of an application by the defendants which sought approval of the date of August 18, 1981 as the effective date of the plan, the Court entered an Order setting such date and stating that the defendants would act as Estate Administrator for the plan. The transaction with Provident in accordance with the plan was closed on August 18, 1981.

In an Order dated Setember 18, 1981, the United States District Court for the Northern District of Georgia dismissed Whitehorn's appeal for the Orders approving the sale of assets as moot "in that the amended plan providing for the

sale of the stock in lieu of a sale of the assets has been approved and consummated." The District Court also noted that the order approving the sale of stock had not been appealed from and that no stay of said sale had been obtained. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order dismissing Whitehorn's appeal as moot because the order confirming the plan was not appealed and the sale authorized by the plan was not stayed.

On August 18, 1982, this Court entered an Order in an adversary proceeding between Jack Whitehorn and Dr. John Whitehorn which held that the execution by Jack Whitehorn of the stock option agreement to John Whitehorn was a preferential transfer and therefore voidable[1] under 11 U.S.C. §547. On appeal, the District Court on May 27,

1983, vacated the order finding the stock option to be a preference and remanded the proceeding to this Court for further findings.

On July 14, 1983, the defendants, as Estate Administrator, and the Creditors' Committee of WFDR filed a joint application to settle claims which provided, inter alia, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish his claim to ownership of the shares in WFDR, which would then be deemed to be held free and clear by Jack Whitehorn. The application further proposed that pursuant to Jack Whitehorn's ownership interest, which would then be undisputed, payment of $35,000.00 wouldf be made from the remaining funds held by the Estate Adminstrator to Jack Whitehorn's attorneys. On January 26, 1984, this

Court entered two Orders approving the proposed settlement, which Orders included statements approving the payment to Jack Whitehorn's attorneys in recognition of his equity interest. Such a payment to Jack Whitehorn's attorneys from the WFDR proceeding for the benefit of Jack Whitehorn's individual estate had been specifically authorized by Order dated May 6, 1983, entered in the District of Nevada where Whitehorn's personal bankruptcy case is pending. The $35,000.00 payment to Whitehorn's attorneys was in fact made following the filing of an application to pay administrative expenses, and, on November 15, 1984, a final decree was entered which closed the estate of WFDR.

It is clear that the claims raised by Whitehorn in the adversary proceeding at bar have been previously addressed by this Court in the WFDR case. The

Bankruptcy Code provides:

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. §1141(a). Under this provision, questions which could have been raised pertaining to confirmed plan are res judicata. See Collier on Bankruptcy ¶1141.01[1] (15th ed. 1987). For a prior judgment to bar a subsequent action under the doctrine of res judicata, the parties must be the same in both suits, the prior jdugment must have been entered by a court of competent jurisidiction, there must have been a final judgment on the merits, and the

same cause of action must be involved in both cases. See., e.g., Southmark Properties v. Charles House Corporation, 742 F.2d 862, 869 (5th Cir. 1984).

Here, Jack Whitehorn, as a creditor and disputed shareholder of WFDR and by his active participation in WFDR's reorganization, was clearly a party-in-interest to the orders entered in WFDR's Chapter 11 case. The Orders approving the sale of assets, which Orders were appealed, and the confirmation order, which was not appealed, constitute final judgments on the claims raised by Whitehorn in the WFDR reorganization and, if the claims now raised by Whitehorn are the same and if this Court had jurisdiction to enter those orders, then Whitehorn is precluded from raising the same claims again.

Whitehorn's complaint seeks a turnover of the WFDR stock certificates

and "all assets said stock owns." In the Orders approving the sale of assets, this Court approved the sale of the assets of WFDR free and clear of all claims and interests and also authorized WFDR and the purchaser to restructure the transaction as a stock acquisition or merger. Such a restructuring of the deal was proposed by the amended plan which was confirmed on June 29, 1981, and which provided for cancellation of existing stock while new stock was issued to Provident, as purchaser. Whitehorn's claims challenging the sale of assets or the cancellation of his stock (including his claim that reissuance of stock pursuant to the plan violated securities laws) are therefore barred by res judicata if this Court had jurisdiction to enter those orders.

This appears to be the key to Whitehorn's argument in this proceeding:

that this Court had no power to enter orders affecting Jack Whitehorn's property because his property was under the exclusive jurisdiction of the United States Bankruptcy Court for the District of Nevada and was protected by the automatic stay pursuant to 11 U.S.C. §362 when he filed his own Chapter 11 case in that district. Assuming that WFDR property had its bankruptcy case before this court[2] and even if it was undisputed from the beginning that Jack Whitehorn was the sole shareholder of WFDR, this Court entered no Orders and the defendants took no action which would require that the stay be lifted in Whitehorn's individual case in Nevada.

As a shareholder, Jack Whitehorn had certain rights in the corporation's bankruptcy case, including the right to receive a distribution of the residual value of the corporation after all claims

against the company were satisfied. The cancellation of the existing WFDR stock did not affect such right because Jack Whitehorn received in its place certificates of interest in the proceeds of the sale of WFDR, and a distribution of such proceeds was in fact made on Jack Whitehorn's behalf to his attorneys. it is true, as Whitehorn argues, that the question of ownership of stock was ultimately decided in Jack Whitehorn's favor. Jack Whitehorn benefited from his ownership interest when his attorneys were paid from the proceeds of the sale of the newly issued stock of WFDR. His ownership entitled him to such a distribution, but his own bankruptcy filing did not give him any greater rights to challenge the sale than he already possessed as a party-in-interest in WFDR's case. It thus appears that the orders in the WFDR case did not affect

Jack Whitehorn's property rights but only affected the pieces of paper representing such rights -- i.e. the stock certificates which were cancelled and replaced by certificates of interest in the sale of the proceeds.

Whitehorn's own bankruptcy could not stay the ministerial act of cancellation of shares by the corporate debtor-in-possession any more than any indvidual shareholder's bankruptcy could stay the fluctuation of the market prices of such individual's shares. Although the automatic stay protects a debtor from certain acts against his property, it does not enhance his rights held pursuant to contracts, leases, or stock certificates. In short, this court had jurisdiction as a result of WFDR's filing to issue Orders approving the sale of assets or the cancellation of stock even if an individual stockholder's own

bankruptcy case was pending in another jurisdiction.[3] Therefore, Whitehorn's claims are barred as res judicata.

Furthermore, following the approved sale of assets or cancellation of stock, the actual WFDR certificates were of inconsequential value and are therefore not subject to turnover under 11 U.S.C. §542.

Finally, the Court notes that the defendants have filed a motion to amend their answer to assert the affirmative defense of the statute of limitations to the extent that the complaint seeks to avoid a post-petition transfer pursuant to 11 U.S.C. §549. The plaintiffs have responded that they do not oppose the amendment but deny that the statute of limitation is applicable because their complaint does not raise §549. The Court will therefore grant the motion to amend, but holds, as a further ground for

granting defendants' summary judgment motion, that the clear language of 11 U.S.C. §549(d)(1) would bar Whitehorn's action to any extent that it does seek to avoid a post-petition transfer, because the action was not commenced within two years of the transaction sought to be avoided.

Accordingly, it is ORDERED:

(1) that the defendants' motion for leave to amend answer is GRANTED:

(2) that the plaintiffs' motion for summary judgment is DENIED; and

(3) that the defendants' motion for summary judgment is GRANTED, and this proceeding is therefore DISMISSED.

At Newnan, Georgia, this 31 day of July, 1987.

W. H. Drake, Jr.

United States Bankruptcy Judge

FOOTNOTES

1 To any extent that Jack Whitehorn is now asserting that the Order finding a preferential transfer shows that WFDR had no right to file its Chapter 11 case without his authorization, this assertion would be beyond the holding of that Order. Finding the stock option agreement to be a preference does not mean that the Court found the agreement was void from its inception, or that the transfer, in effect, never took place. Rather, the Order finding a preference holds that the transfer of stock ownership which did occur is voidable and could therefore be reversed by Jack Whitehorn. This Court has never found the transfer to be void and has, in fact, in the March 16, 1981 Order approving the sale of assets, explicitly rejected

Whitehorn's assertion that the management elected through the exercise of the proxy contained in the stock option agreement lacked the authority to commence WFDR's Chapter 11 case.

2 Any claim to the contrary would be barred by res judicata since this Court rejected Whitehorn's claim that the management which authorized the filing of the petition lacked the power to do so.

3 Statutory authority for this conclusion can be found at 11 U.S.C. §1141(d)(1)(B) which provides that a confirmed plan terminates all rights and interests of equity security holders provided for by the plan, unless the plan states otherwise.

Appendix 7

Transcript of Motion for

Change of Venue

Adversary Proceeding No. 860045

from Commencement Court

United States Bankruptcy Court

District of Nevada to

United States Bankruptcy Court

Northern District of Georgia

Newnan Division

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Adversary Proceeding No. 860045

TRANSCRIPT OF MOTION

BEFORE THE HONORABLE ROBERT CLIVE JONES

THE COURT: All right. The matter is submitted.

First as to jurisdiction, I don't see any issue on jurisdiction. This is an issue for change of venue. there is nationwide service and personal jurisdiction under the Statute and under the Rules over the current parties. The issue really is convenience, however.

While this Court has some reservation about the sale of the stock without lifting the stay -- and I do have those reservations -- this Court would have undoubtedly lifted the stay if it had been asked so that a complete proceeding could resolve not only assets but stock of a corporation which holds a

broadcasting license.

But while I have real reservations about disposition of that stock without first asking for lifting of stay in this estate, if that Court or upon appeals any higher Court made mistakes or errors, I think in all fairness it's up to that Court to correct it. It's not fair to collaterally attack the result of those orders here. I have to have as much faith in the selection process and the appointment of Judges in Georgia as I do in the ones in Nevada. Having that faith justice will either be done there or Appellate Courts will appropriately rule.

But looking simply to the issue of convenience and the parties involved and who the parties likely are to be involved, witnesses and the fact that substantial prior proceedings relating to the assets, if not assets and stock, certainly arguments relating to assets

and stock have been heard by that Court. It makes every sense to me to transfer just the adversary and the adversary alone there.

I'm not lifting the stay, of course, with respect to any of Mr. Whitehorn's assets. That has to be -- I'm not lifting the stay. I'm just simply transferring venue of the case, the adversary proceeding.

But on that basis, the Rules applicable to change of venue, I have to grant the motion. So, that will be the order of the adversary only.

MS. RIEGLE: Thank you. I'll prepare the order and send a copy to Mr. Whitehorn.

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

BY: SHEILA KLIWINSKI

J & J COURT TRANSCRIBERS

DATE: August 13, 1986

Appendix 8

Transcript and Order of Judge Jones'
Ruling on Show Cause Hearing
Pertaining to Wording in Order to
Transfer Venue of
Adversary Proceeding No. 860045
Entered December 17, 1986

Certificate That No Proceeding
to Lift Stay Has Been Filed
Entered December 2, 1986

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

Case No. BK-S-80-00936

Adv No. ADV-S860045

Portion of Hearing/Judge's Ruling

Motion to Show Cause

Before the Honorable Robert Clive Jones,

Bankruptcy Judge

Transcript ordered by: Jack Whitehorn

PROCEEDINGS IN PROGRESS

THE COURT: Well, what I meant, of course, on page 3 is that I'm not lifting the stay to allow you to take any counterclaims with respect to any of his assets or to ask for -- for example, sanctions. You'd have to ask this Court for relief.

MS. RIEGLE: Yeah, but I -- I don't disagree, but there was no such motion on, and I'm just concerned if we start putting surplusage into a motion/

THE COURT: Well, I don't/

MS. RIEGLE: /to transfer venue.

THE COURT: /I don't like Mr. Whitehorn's language, but I -- I agree that there should be an additional statement. And it should be -- it is further ordered that this Court is not lifting the stay, with respect to any of Mr. Whitehorn's assets, period.

MS. RIEGLE: But there was no motion on.

THE COURT: I'm not ruling on, whether or not -- and I don't want any language in the order on, whether or not, I lifted the stay or Judge George lifted the stay previously. That's -- the record will disclose that or not disclose that and I'm not ruling on that in here.

But I do want it clear that I'm not lifting the stay presently, with respect to Mr. Whitehorn. I can certainly see why the Court would feel at Liberty -- I

would feel at liberty to take the entire thing with respect to Mr. Whitehorn and allow -- allow amendments to the answer, for example, to allege damages against him and that may well be appropriate. It may well be that sanctions are appropriate, but I want the stay lifted here first, before you can do that.

So that's why I think it is appropriate to tell that Court in all fairness, that I'm not lifting the stay/

MS. RIEGLE: Okay.

THE COURT: /that you do need to come back for that.

MS. RIEGLE: I have no problem, except there was no motion on, and I think it just -- when you add surplusage like that.

THE COURT: All right, let's amend the order and put the additional sentence: "It is further ordered that this Court is not lifting the stay with

respect to many --- of any of Mr. Whitehorn's assets, period."

MS. RIEGLE: Let's add, and I apologize, I don't want anybody, you know, -- if we have another Judge tomorrow, I don't want somebody to think that I've raised a motion and you denied my motion.

THE COURT: Raised what motion?

MS. RIEGLE: The order. If it read that way, a Judge will come into tomorrow, if I move to lift stay, let's assume to seek damages, quite frankly, I've thought about it. And they say you denied it.

THE COURT: But you can say, is not presently lifting.

MS. RIEGLE: Okay, but there was no motion to rule on. Do you see my problem? If a Judge comes in tomorrow, some --- heaven forbid something happens to Your Honor, we have an order that

says, you haven't/

THE COURT: I could happen, there's some threat out there. (laughter)

MS. RIEGLE: Of course, you might drown in the rain out there.

THE COURT: So -- and so how would there be any/

MS. RIEGLE: The Court would come in and say, this Court has ruled that I'm not going to lift the stay.

THE COURT: No.

MS. RIEGLE: Then I'd have to lift the stay and it's without prejudice.

THE COURT: I don't think so. Let's put it in there, "That this Court is not presently lifting the stay, with respect to any of Mr. Whitehorn's assets."

MR. WHITEHORN: Thank you, Your Honor.

THE COURT: That's without prejudice to any further motion to lift the stay.

MS. RIEGLE: Then I don't say, I'm

without prejudice to a motion to lift stay. Let's make that expressed.

THE COURT: I -- let's make it this way, "It is further ordered that this Court is not presently lifting the stay, with respect to any of Mr. Whitehorn's assets, period."

MR. WHITEHORN: Thank you, again, Your Honor.

MS. RIEGLE: But again, I'm sorry, without prejudice to the bringing of such a motion.

THE COURT: No, I think that's sufficient, to state it. --- It is further ordered that this Court is not presently lifting the stay with respect to any of Mr. Whitehorn's assets. Okay?

MR. WHITEHORN: Ms. Riegle will prepare the order, please -- submit it?

MS. RIEGLE: Yeah,I/

MR. WHITEHORN: Thank you, very much.

MS. RIEGLE: /I'm just confused the Court is going to get confused there about, whether or not we can defend even -- the turnover.

THE COURT: Here, I'll make it clear on the record/

MS. RIEGLE: Without seeking/

THE COURT: /you're at liberty to defend the turnover.

MS. RIEGLE: To defend. Yeah.

THE COURT: You're -- the venue of that case was transferred there.

MR. WHITEHORN: Thank you, again, sir.

THE COURT: This is your transcript, Ms. Riegle.

MS. RIEGLE: Oh, I'm sorry.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF

PROCEEDINGS IN THE ABOVE - ENTITLED MATTER.

NORTHWEST TRANSCRIPTION SERVICE
P. O. BOX 890
NAMPA, IDAHO 83653
(208) 466-2743

Gayle M. Lutz

SIGNATURE OF COURT REPORTER/TRANSCRIBER

11/25/86

DATE

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

Case No. BK-S-80-00936

Adv No. ADV-S860045

AMENDED ORDER

Entered December 17, 1986

The motion of defendants Margaret H. Murphy and the law firm of Smith, Gambrell and Russell (collectively referred to as "Murphy") having come on regularly for hearing on June 24, 1986, defendants appearing by and through their attorney Linda Riegle of Lionel Sawyer & Collins, plaintiffs/debtors appearing in proper person through Jack Whitehorn, this Court having read and considered the papers and pleadings on file herein, having heard and considered the arguments presented and having found that the interest of justice and the convenience of the parties would best be served by a

change of venue;

IT IS HEREBY ORDERED that the motion of defendants to transfer the venue of adversary proceeding No. 86-0045 filed in BK-S-80-936 is granted; and

IT IS FURTHER ORDERED that such proceedings be transferred to the Northern District of Georgia, Newnan Division and that all pleadings and papers on file in such proceedings be transferred to that district; and

IT IS FURTHER ORDERED that this Court is not presently lifting the stay with respect to any of Mr. Whitehorn's assets; and

IT IS FURTHER ORDERED that the May 9, 1986 order of this Court setting, among other things, trial of the adversary proceeding set for December 10, 1986 at 9:00 a.m. is hereby vacated.

DATED this 16 day of December, 1986.

Robert Clive Jones/BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

Case No. BK-S-80-00936

Adv No. ADV-S860045

C E R T I F I C A T E

This is to certify that relief was ordered and entered in the above styled case, October 6, 1980, pursuant to Debtors' petition, attached hereto and incorporated herein.

This is to further certify that as of this date, no proceeding has been filed or entered in the above styled case for the lifting of automatic stay on WFDR, Inc. stock shown in Debtors' Statement of Affairs as set forth in Schedule B-2(T) and B-3, attached hereto and incorporated herein.

This 2nd day of December, 1986

Patricia Gray-Edwards, Clerk

Schedule B-2(T)

Whitehorn Co., Inc. (Ga. Corp.) 100% stock (insolvent)* -0-

- See schedule B-3

Vegas Unlimited Inc. (Nevada Corp.) 500.00

WFDR, Inc. (Ga. Corp.) 100% Stock. Presently in litigation over ownership - See Schedule B-3*. 1,500,000.00

Schedule B-3

<u>WFDR, Inc. Stock and Whitehorn Company stock and debts</u>:

There is litigation currently pending in Atlanta, Georgia and Dallas, Texas over the ownership of the WFDR, Inc. stock. Debtor Jack Whitehorn acquired same approximately ten years ago. WFDR, Inc. owns two radio stations in Manchester, Georgia. At issue is a purported "Stock Option Agreement" dated March 28, 1980 between Debtor Jack Whitehorn and Debtor Jack Whitehorn's

brother, John Whitehorn of Dallas, Texas and the purported exercise of an option by John Whitehorn to acquire the WFDR, Inc. stock on May 22, 1980. John Whitehorn caused WFDR, Inc. to file a Chapter XI proceeding in the Northern District of Georgia, Newnan Division, on May 9, 1980. Jack Whitehorn has challenged the validity of this Agreement and action before the Federal Communications Commission and has initiated an adversarial proceeding in the Georgia Chapter XI proceeding. John Whitehorn has brought an action in Dallas, Texas, Debtor Jack Whitehorn states that he believed the document he signed was to create a trust for the benefit of him and his family. Under the purported Stock Option Agreement he states he would receive no payment for his stock and that he has received no payment for same. He is challenging the validity of the

Agreement and the exercise of the option on a number of grounds. A qualified broker has valued the FM station assets and license alone at $1.5 million. Debtor Jack Whitehorn states that he believes that a conservative estimate for the value of both stations would be $1.5 million ($2 million for the stations less approximately $500,000.00 in liabilities). UNKNOWN

Debtor believes that this transaction relating to the Stock Option Agreement is also voidable as a preference to an insider.

Because of the above litigation and records which are not in the Debtor's possession or control, all reference to debts and values involving an interrelationship among Debtor, Whitehorn Company and WFDR, Inc. are approximate and are subject to further determination and the results of the pending litigation as are

claims by Doctor Jack Whitehorn against John Whitehorn and the management installed by John Whitehorn. 11 U.S.C. §522(d)

Appendix 9

Order Setting Out

That All Provisions of

Title 11 United States Bankruptcy Code

Are Restored Nunc Pro Tunc

October 6, 1980 to Petitioners/Debtors

Entered May 31, 1988

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

Case No. BK-S-80-936RCJ

Entered May 31, 1988

ORDER

The motion of Debtors-in-Possession, Jack R. Whitehorn and Mary Ruth Whitehorn, for action to vacate the order of dismissal of above said case entered October 7, 1987, having come on regularly for hearing on May 10, 1988, Objectors, Cherry Lane Music Company et al, Margaret H. Murphy and Law Firm, Smith, Gambrell & Russell, appearing by and through their attorney Carol White of Lionel Sawyer & Collins, Movants/Debtors-in-Possession appearing in proper person through Jack Whitehorn, this Court having read and considered the papers and pleadings on file herein, having heard and considered the arguments presented and having found that the Movants/Debtors-in-Possession

were not properly notified of the show cause hearing pursuant to the Movants/Debtors-in-Possession's mailing address on file at time of said notice as set out in the Court Clerk's official calendar.

IT IS HEREBY ORDERED that the motion of Debtors-in-Possession, Jack R. Whitehorn and Mary Ruth Whitehorn to vacate the order of this court entered October 7, 1987, is granted; and

IT IS FURTHER ORDERED that all provisions of Title 11 United States Bankruptcy Code is restored nunc pro tunc the commencement date of October 6, 1980, to said Debtors.

DATED this 31st day of May, 1988.

Robert Clive Jones

Appendix 10

United States Court of Appeals

for the Eleventh Circuit

Order Denying Motion of Appellants

for Enlargement of Time

for Stay of Mandate

Entered October 4, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 88-8018

Appeal from the United States

District Court for the

Northern District of Georgia

ORDER

IT IS ORDERED that the motion of appellants for a further stay of the issuance of the mandate is DENIED.

/s/ PHYLLIS A KRAVITCH

UNITED STATES CIRCUIT JUDGE